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MICHAEL RODAK, JR.,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1581

EKBERG SHIPPING CORP.,

*Petitioner,*

—against—

ELENA JEREZANO MONCADA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on January 21, 1974.

### Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, is reported in 491 F. 2d 470. The unreported oral decision of the District Court is printed in the Joint Appendix below (52a-54a).

### Jurisdiction

The judgment of the Court of Appeals dated January 21, 1974 was entered January 21, 1974 and is printed in Appendix B hereto. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Question Presented

Should extra-territorial application of the Jones Act hinge on the substantiality of the seaman's U.S.A. contacts, or the substantiality of the employer's U.S.A. contacts?

## Statute Involved

The Jones Act, 46 U.S.C. 688, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

## Statement

Respondent widow sued petitioner shipowner under the Jones Act for negligently causing her seaman husband's death.*

Decedent, who had no U.S.A. contacts (33a), was a native born Honduran citizen and resident (26a). He was a member of an Honduran seamen's union with which petitioner had an agreement that Honduran seamen in its employ and their dependents would be compensated under Honduran law for injury or death (27a, 34a, 46a-47a).

Petitioner employed decedent as a seaman on the S.S. EKBERG from June 12, 1968 until September 27, 1968 (28a, 40a). He signed on at Balboa, Panama (71a) and died aboard ship at Maceio, Brazil (109a).

Petitioner was incorporated in Liberia (24a) to buy from Panamanian owners a Panamanian ship HILDA LEE, which was renamed EKBERG and transferred to Liberian flag and registry (42a). From May 1967 until November 1968, when the ship was sold (42a, 45a), petitioner owned the EKBERG (21a) and employed her crew of Spanish officers and majority Honduran seamen (43a-44a).

S.S. EKBERG was bought primarily for spot tramping (i.e., short voyage charters) in the Caribbean (42a), which is all the ship did during decedent's employ (39a). The EKBERG traded exclusively in the Caribbean while owned by petitioner, with approximately 40% of the voyages either to or from some U.S. port and the remaining 60% entirely foreign (25a). During the 3½ months decedent was a crew-

* The widow also sued petitioner for unseaworthiness, and sued two co-defendants for negligence and unseaworthiness. The question presented is unaffected by the disposition of those other claims.

member, S.S. EKBERG called at only two U.S. ports during a single voyage two months before he died (28a-29a). Two days before he died, the ship arrived in ballast at Maceio to load sugar en route from Santos, Salvador where she had discharged cement loaded at Puerto La Cruz, Nicaragua (29a, 75a, 92a).

A New York corporation managed and operated S.S. EKBERG from New York as agent for petitioner, and another New York corporation brokered the spot chartering (39a-41a, 48a). All corporate officers and stockholders of petitioner, the operating agent, and the chartering broker are U.S. citizens (23a).

The District Court dismissed the widow's Jones Act claim against petitioner because of insufficient U.S. contacts (54a). The Court of Appeals reversed and remanded for a new trial on the ground that U.S. stock ownership, U.S. corporate officers, U.S. operations base, and 40% voyages to or from U.S. ports were sufficiently substantial contacts to establish Jones Act jurisdiction.

## Reasons for Granting the Writ

There is a "problem of statutory construction". *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). Should extraterritorial applicability depend on whether decedent was a Jones Act "seaman", or whether petitioner was a Jones Act "employer", or both.

In *Hellenic Lines* v. *Rhoditis*, 398 U.S. 306, 310 (1970), the majority opinion by Mr. Justice Douglas decided "the Court of Appeals was clearly right in holding that petitioner Hellenic Lines was an 'employer' under the Jones Act." The dissenters, in an opinion by Mr. Justice Harlan,

thought the criterion should be whether "the injured seaman is an individual whose well-being is a concern of this country." 398 U.S., 314. The majority, conceiving a "national interest served by the assertion of Jones Act jurisdiction", 398 U.S., 309, saw "no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibilities of a Jones Act 'employer'." 398 U.S., 310. The dissenters thought "the underlying concern of the legislation before us is the adjustment of the risk of [personal injury] loss between individuals and not the regulation of commerce or competition", 398 U.S., 317, and that "Where, as in the case before us, the injured plaintiff has no American ties, the inquiry should be directed toward determining what jurisdiction is primarily concerned with plaintiff's welfare", 398 U.S., 318.

As Mr. Justice Jackson observed in *Lauritzen,* 345 U.S., 577, "Congress in 1920 wrote these all-comprehending words ['any seaman'], not on a clean slate, but as a postscript to a long series of enactments governing shipping." "The history of the statute before us begins with the 1915 enactment of the comprehensive La Follette Act * * 38 Stat. 1164." 345 U.S., 579. Although the Jones Act history itself, "is of little help * [having] * passed through both Houses of Congress without debate, and without discussion in committee reports", *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437, 450 (2 Cir. 1959), cert. denied 359 U.S. 1000 (1959), the 1915 statute is entitled "An Act To promote the welfare of American seamen in the merchant marine of the United States", *Lauritzen,* 345 U.S., 579. As Judge Learned Hand noted in *Gambera* v. *Bergoty,* 132 F. 2d 414, 416 (2 Cir. 1942), "The Jones Act was the

culmination of a series of efforts * * to secure more adequate relief for American seamen, injured in their employment."

The court below relied on *Rhoditis* and on its own dictum in *Bartholomew*. In both cases, the material facts are distinguishable. In *Rhoditis*, the seaman "was injured in the Port of New Orleans, Louisiana, aboard a vessel regularly engaged in a scheduled trade to and from the United States Gulf ports", 273 F. Supp., 249, and the majority opinion iterated and relied on the facts that "The injury occurred here. * * The *Hellenic Hero* was not a casual visitor; rather, it and many of its sister ships were earning income from cargo originating or terminating here." 398 U.S., 310. In *Bartholomew*, as Mr. Justice Harlan distinguished in *Rhoditis*, 398 U.S., 316-7, fn. 4, "plaintiff was an American domiciliary" who, as Judge Hand established in *Gambera*, 132 F. 2d, 416, was thereby an American seaman for Jones Act purposes. Also, since defendant brought Bartholomew to the United States two years before to sail on defendant's ships, 263 F. 2d, 441, the vessel was most probably in U.S. liner service.

The court below also relied on *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236 (S.D. N.Y. 1958), which held that U.S. ownership and control of the foreign corporate owner of a foreign flag ship warranted application of the Jones Act, otherwise "an American owner might escape his statutory liability merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns", 168 F. Supp., 238. The circuitous rationale begs the question of whether Congress intended the American owner of a foreign flag ship to have any Jones Act liability. "As an economic matter there seems little to distinguish this phe-

nomenon from other movements of American capital abroad in search for cost reductions." Note, 60 Col. L. Rev. 711.

Except for assumed legislative acquiescence to self-serving judicial assertions, there is no indication that Congress intended the Jones Act to be used "as a means of benefiting seamen [by] enhancing the costs of foreign ship operation for the competitive advantage of our own." *Lauritzen*, 345 U.S., 593. Aside from considerable doubt that no Jones Act liability "is a significant contribution to the competitive advantage of foreign-flag ships" • [or that] • "Jones Act liability [is] a significant uncompensated cost in the operation of an American ship", *Rhoditis*, 398 U.S., 317, the Act was passed 20 years before the advent of flags of convenience/necessity and "In this historical context, the dichotomy between U.S. and foreign vessels then before Congress did not involve the category of U.S. owned-foreign registered vessels." *Lopes* v. *S.S. Ocean Daphne*, 337 F. 2d 777, 779 (4 Cir. 1964).

Apart from incompatibility with *Lauritzen*'s motivating concern for "reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations • • under prevalent doctrines of international law", 345 U.S., 577, punitive application of the Jones Act to regulate international commerce and foreign competition is inconsistent with related decisions of the Court and is at cross-purposes with actions by Congress and the Executive.

An infinitely more effective way to equalize competition between American and foreign vessels engaged in U.S. commerce would be to permit our unions to Americanize the wages and working benefits of foreign crews. But, as the majority reaffirmed in *Windward Shipping (London)*

*Ltd.* v. *American Radio Ass'n,* —— U.S. ——, 42 LW 4234 (2/19/74), for the past 17 years the Court has repeatedly held that the Labor Management Relations Act does not countenance American union action against foreign ships manned by alien crews, quoting, *inter alia, Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10 (1963). "Studying the legislative history of the Act, the Court found no indication that it was intended to govern disputes between foreign ship owners and foreign crews. On the contrary, the Court concluded that the most revealing legislative history strongly suggested the bill was a 'bill of rights . . . for *American* workingmen and their employers.' 353 U.S., at 144. (Emphasis in original.) The Court stated that this history 'inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.' *Id.,* at 144." 42 LW, 4236. Although Congress undeniably has the power, 372 U.S., 17, and the literal statutory language is broad enough, 372 U.S., 19, "We therefore conclude, as we did in *Benz,* that for us to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed'." *McCulloch,* 372 U.S., 21-22. Congress "simply did not intend that Act to erase long-standing principles of comity and accommodation in international maritime trade." *Windward Shipping,* 42 LW, 4237. The rationale, references, and much of the language in *Benz* through *Windward Shipping* is equally pertinent to extra-territorial application of the Jones Act. But the consistent start made in *Lauritzen* could not be perpetuated by a minority in *Rhoditis.*

Contrary legislative and executive actions abound. For instance, under 46 U.S.C. 835, a U.S. flag shipowner can transfer to foreign flag with Maritime Administration consent, long encouraged with tacit Congressional approval for transfers to Panama, Liberia, and Honduras so as to assure an adequate merchant fleet under effective U.S. control. Note, 60 Col. L. Rev., 712-713; Note, 69 Yale L.J., 501. By virtue of 46 U.S.C. 1282, 1283(a), 46 C.F.R. 308.1, our Government provides essential war risk coverage to "Panlibhon" vessels if U.S. owned either directly or through a foreign corporation.

In 1961 Congress created the Overseas Private Investment Corporation to encourage and facilitate investment of U.S. private capital in friendly developing nations, 22 U.S.C. 2191, and we have OPIC guarantee agreements with both Liberia and Honduras. OPIC Incentive Handbook for Investment Financing, Appendix 2. In the Foreword to OPIC's 1972 Annual Report, the President wrote:

> "The major contribution that U.S. private investments overseas make to this country's economy are also a great credit to your organization. These investments have contributed nearly $8 billion to the U.S. balance of payments, have created more than 600,000 jobs in this country, and have helped assure our continued supply of important raw materials. Continued growth of the country's overseas investment is essential."

Judicial discouragement of Maritime Administration facilitated U.S. ownership and operation of "Panlibhon" ships is made more incongrous by Congressionally encouraged OPIC facilitated U.S. ownership and operation of "Panlibhon" chemical plants, fiberglass manufacturers, hog

farms, hotels, merchant banks, power stations, etc., etc. American foreign investment has been additionally promoted by E.O. 11766 (1/31/74) reduction of the I.R.C. § 4911 interest equalization tax rate to zero.

The indelible futility of attempting to make the Jones Act an economic weapon is itself indicative of judicial misapplication. As the Court noted in *Windward Shipping,* 42 LW, 4235, 4238, because American seamen's wages are 2½-4 times those of foreign seamen, 95% of U.S. exports are carried by foreign ships. Further decline in U.S. merchant flag employment is forecast. 1972-1973 Occupational Outlook Handbook, U.S. Dept. of Labor Bull. 1700, p. 742. The economic realities are reflected in three companion articles in the March 29, 1974 Journal of Commerce, vol. 319, no. 23,166, p. 3, col. 4, p. 24, col. 6, 8. The U.S. Department of Commerce, Bureau of Economic Analysis forecast BEA 74-21 (3/28/74) that "Expenditures for property, plant, and equipment by majority-owned foreign affiliates of U.S. companies are expected to rise 18 percent in 1974, to $23.8 billion". The Marine Index Bureau's Statistical Analysis No. 58 (3/27/74) reports that "1973 witnessed a drop in the average number of seafaring jobs on U.S. commercial ships 1000 tons and over to the lowest point in the past half century. From a World War II peak of 161,000 in 1945, the all-time low average of 26,300 was reached in the past year." The U.S. Army Corps of Engineers issued a March 18, 1974 news release that "Waterborne commerce of the United States in the calendar year 1973 totalled 1,737,000,000 tons, a new all-time high * * * . By far, the greatest advances were realized in foreign traffic. In this trade, imports registered an increase of 17.2 percent while foreign export shipments surged upward 20 percent."

The writ should be granted to reconsider the rationale of *Rhoditis* and its progeny. *Cf., Afroyim* v. *Rusk,* 387 U.S. 253, 256 (1967); *Marchetti* v. *United States,* 390 U.S. 39, 41 (1968). Although the judgment below is non-final, the important question presented is certainly "fundamental to the further conduct of the case". *U.S.* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 148, 153-154 (1964), another Jones Act case. While the court below mentioned 40% voyages to/from U.S. ports as a makeweight, it held that "the most important [contact] is that all of the stock of all the defendants was owned by Americans", to which it added U.S. operations base and U.S. corporate officers.

## Conclusion

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

WILLIAM M. KIMBALL
*Counsel for Petitioner*

New York, New York
April 19, 1974.

# APPENDICES

## APPENDIX A

### Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 48—September Term, 1973.

(Entered January 21, 1974.)

Docket No. 73-1184

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ELENA JEREZANO MONCADA, as Personal Representative of the Estate of Arturo Moncada, Deceased,

*Plaintiff-Appellant,*

v.

LEMURIA SHIPPING CORP., S.A. LUMBER & SHIPPING CORP., and EKBERG SHIPPING CORP.,

*Defendants-Appellees.*

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Before:

MOORE, HAYS and FEINBERG,

*C.JJ.*

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Appeal from orders of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* dismissing plaintiff's claims.

Affirmed in part, reversed in part, and remanded.

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HAYS, *Circuit Judge*:

Arturo Moncada was a Honduran seaman employed aboard the S.S. Ekberg from June 12, 1968 until his death on September 27, 1968. Moncada fell ill and died aboard ship at Maceio, Brazil. The medical examiner determined the cause of death to be severe edema of the lungs (pulmonary congestion). Alleging negligence by the master of the ship in failing to call a doctor rapidly, the widow of the decedent brought this suit under the Jones Act and general maritime law against Ekberg Shipping Corp. (which owned the vessel and employed the crew), Lemuria Shipping Corp. (the chartering broker for the vessel), and S.A. Lumber & Shipping Co. (which managed the ship).

The district court held that the American contacts were insufficient to establish Jones Act jurisdiction. It therefore dismissed the Jones Act claim and discharged the jury to which plaintiff would have been entitled under the Jones Act. Proceeding to trial without a jury, the judge found for defendants. We reverse as to defendant Ekberg Shipping Corp., but affirm as to the other defendants.

The literal terms of the Jones Act do not require that either the parties or the injury have any connection with the United States.[1] However, the courts have long recognized that Jones Act jurisdiction is subject to some limitations. See *Lauritzen* v. *Larsen*, 345 U.S. 571, 576-77 (1953). In *Bartholomew* v. *Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), cert. denied, 359 U.S. 1000 (1959), we held that Jones Act jurisdiction exists only where there are substantial contacts between the transaction involved in the case

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[1] The Jones Act, 46 U.S.C. §688 (1970), reads as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ."

and the United States, with substantiality to be determined on an absolute scale and not by comparing or balancing the presence of certain contacts with the absence of others. Id. at 440-41. No subsequent decision of this court or of the Supreme Court has undercut the holding of *Bartholomew*. Indeed, in *Hellenic Lines Ltd.* v. *Rhoditis,* 398 U.S. 306, 309 n.4 (1970), the Supreme Court expressly adopted the test enunciated by Judge Medina in *Bartholomew*. Whether, as appellant suggests, the dissent in *Rhoditis* might now win the support of a majority of the Supreme Court is not for us to decide.

In determining whether the contacts in a given case are "substantial" the courts have given consideration to the significance attaching to specific contacts. In *Lauritzen* v. *Larsen,* supra, the Supreme Court enumerated the following contacts as worthy of consideration: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. 345 U.S. at 583-92. In *Rhoditis* the Court held that this list is not exhaustive. It decided that the shipowner's base of operations is also an important contact and that "there may well be others." 398 U.S. at 309. Thus we must consider each factor and its importance in the context of this case.

The majority of the contacts enumerated in *Lauritzen* seem to favor the defendants in this case. But as we have indicated above, our task is not to weigh or balance present against absent contacts, but merely to determine whether the contacts which are present are substantial. Thus the Court in *Rhoditis* found for the plaintiff although the majority of contacts favored the defendant. Moreover, many of the factors here favoring defendants have been declared

insignificant in *Lauritzen* and succeeding cases. In *Lauritzen* the Court conceded that traditional maritime law "gives cardinal importance to the law of the flag," 345 U.S. at 584, but noted that in light of resort of American shipowners to foreign flags of convenience, courts have often ignored the law of the flag in order "to enforce against American shipowners the obligations which our law places upon them." Id. at 587. Other contacts to which the courts have paid little attention include the place of injury, *Lauritzen,* supra, at 583; the place where the contract was made, *Lauritzen,* supra, at 588-89; *Southern Cross Steamship Co.* v. *Firipis,* 285 F.2d 651, 653 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961); and the inaccessibility of a foreign forum, *Lauritzen,* supra, at 589-91; *Southern Cross Steamship Co.* v. *Firipis,* supra, at 653.

Of the contacts favoring the plaintiff in the present case, the most important is that all of the stock of all the defendants was owned by Americans. In *Bartholomew* we suggested that American ownership alone suffices to establish Jones Act jurisdiction. 263 F.2d at 443 n.4. That position was expressly adopted by then District Judge Irving R. Kaufman in *Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S.A.,* 168 F. Supp. 236 (S.D.N.Y. 1958). However, we need not rely upon this ground alone, for there are here additional contacts which, when added to American ownership, make the sum of the contacts substantial. The Supreme Court in *Rhoditis,* approving *Pavlou* v. *Ocean Traders Marine Corp.,* 211 F. Supp. 320, 325 (S.D.N.Y. 1962), held that the shipowner's base of operations is also significant. 398 U.S. at 309. The location of the managing and chartering agents for the vessel are also entitled to consideration. See *Bartholomew,* 263 F.2d at 441. In the instant case all defendants have their base of operations in this country and the managing and chartering

of the vessel were conducted from this country. In addition to those contacts all officers of the defendants are American. See *Bartholomew*, 263 F.2d at 441. Approximately 40% of the vessel's voyages began or ended in American ports. See *Rhoditis*, 398 U.S. at 310.

In light of the precedents construing the Jones Act and of the purposes of Congress in enacting the Jones Act we hold that the contacts between this transaction and the United States are substantial and that Jones Act jurisdiction exists. The decision of the district court must be reversed. Because plaintiff was entitled to have her Jones Act claim tried to a jury, she was also entitled to a jury trial on her claims under general maritime law. *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963); *Harney* v. *William M. Moore Building Corp.*, 359 F.2d 649, 656 (2d Cir. 1966). Thus plaintiff will also have a right to a jury trial of these claims on remand.

Although there were sufficient contacts to establish Jones Act jurisdiction the district court properly dismissed the actions against defendants Lumber and Lemuria on the ground that they neither owned the S.S. Ekberg nor were the employers of the deceased seaman. Thus the dismissal is affirmed as to these defendants. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384-85 (1959); *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949); *Fitzgerald* v. *A.L. Burbank & Co.*, 451 F.2d 670 (2d Cir. 1971); *Dassigienis* v. *Cosmos Carrier & Trading Corp.*, 442 F.2d 1016 (2d Cir. 1971).

## APPENDIX B

### Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of January one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

*Circuit Judges.*

73-1184

---

ELENA JEREZANO MONCADA, as Personal Representative of the Estate of Arturo Moncada, Deceased,

*Plaintiff-Appellant,*

v.

LEMURIA SHIPPING CORPORATION, S.A. LUMBER & SHIPPING CO., INC., and EKBERG SHIPPING CORP.,

*Defendants,*

EKBERG SHIPPING CORP.,

*Defendant-Appellee.*

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro
*Clerk*

by Vincent A. Carlin,
*Chief Deputy Clerk*